IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

WEDNESDAY, THE 23RD MAY 2007 / 2ND JYAISHTA 1929

OP.No. 7033 of 1998(K)

PETITIONER:

A.FRANCIS, VAYALIKADA KIZHAKKETHIL
VELLIMON WEST (P.O.), KUNDARA, KOLLAM

BY ADV. SRI.M.V.THAMBAN

RESPONDENTS:
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1. STATE OF KERALA REPRESENTED BY THE SECRETARY
TO THE GOVERNMENT, HEALTH AND FAMILY WELFARE (J)
DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM.

2. THE DIRECTOR, DEPARTMENT OF HOMEO
THIRUVANANTHAPURAM.

3. THE DISTRICT MEDICAL OFFICER,
HOMEO, KOLLAM.

BY GOVT PLEADER SRI.THOMAS JOHN AMBOOKEN

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 23/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO.12378 OF 1998 IN OP NO.7033 OF 1998 K

//DISMISSED//

23.05.2007. SD/- THOTTATHIL B.RADHAKRISHNAN, JUDGE.

APPENDIX

PETIITONER'S EXHIBITS:

EXT.P1: TRUE COPY OF THE ORDER NO.24622/E2/D.H/95 DATED 18.12.1995 ISSUED BY THE 2ND RESPONDENT.

EXT.P2: TRUE COPY OF THE REPRESENTATION DATED 24.10.1997 SUBMITTED BY THE PETITIONER BEFORE THE 2ND REPSONDENT.

EXT.P3: TRUE COPY OF THE REPRESENTATION DATED 10.11.1997 SUBMITTED BY THE PETITIONER BEFORE THE 1ST REPSONDENT.

EXT.P4: TRUE COPY OF THE JUDGMENT DATED 19.11.1997 IN O.P.NO.20459/97 IN THE HIGH COURT OF KERALA.

EXT.P5: TRUE COPY OF THE ORDER NO.60335/J3/97/H&FWD DATED 10.3.98 ISSUED BY THE ADDITIONAL SECRETARY TO GOVERNMENT.

EXT.P6: TRUE COPY OF THE TERMINATION ORDER DT.9.9.1996.

/TRUE COPY/

THOTTATHIL B.RADHAKRISHNAN, J.

O.P.No.7033 OF 1998 &
I.A.No.18086 OF 2005

Dated this the 23rd day of May, 2007

JUDGMENT

By his appointment as a Part-Time Sweeper with effect from 26.12.1992, the petitioner stood governed by the Special Rules for the Kerala Part-Time Contingent Service Rules, hereinafter, the "PTC Rules", in terms of Rule 14 of which, he could avail leave, among other types, leave without allowance in special circumstances, for a total period of 120 days in a calendar year. He was not entitled to leave without allowance in terms of Appendix XII A Part I KSR for foreign service, that is, to take up employment abroad or within the State, in a service other than that of the employer State Government.

2. However, the petitioner submitted an application on 2.11.1993, for leave without allowance for five years, to proceed abroad for employment. That application is stated to

have been forwarded to the Government through the second respondent, with the recommendation of the third respondent, to relax conditions and to grant the petitioner leave without allowance for five years as applied for by him. One can hope and a superior can bless. But relaxations in conditions, particularly in relation to grant of leave, are not to be doled out and recommendations ought not to have been made except in exceptional circumstances.

3. If one is able to secure employment abroad and if the Rules of the State Government which govern his service do not provide him the entitlement to apply for grant of such leave, the primary intention is that he is not entitled to such leave. Such an interpretation is the necessary outflow of Articles 14 and 16 of the Constitution in so far as it affects the enormous number of unemployed literate, educated, may be even marginally, but qualified, open market candidates waiting for a Government employment, at least in the categories governed by the PTC Rules.

4. The application of the petitioner for leave without allowances, for a long spell as applied for by him, to work abroad, was not sanctioned. It was pending without orders. However, as stated by the petitioner in the 3rd paragraph of the writ petition, he got an offer for employment in Saudi Arabia. He immediately applied for leave for 120 days without allowance, in terms of Rule 14 of the Special Rules. That was granted. Availing such leave, he went abroad to be employed in a service other than that in the State Government, which was impermissible because he was granted neither leave for foreign service, nor permission to work for another employer. In the context of the PTC Rules, the General Rules and all other rules governing Government servants and the constitutional setting of the State administration, this is impermissible because one cannot leave the service of the State Government to take up employment elsewhere except with the express concurrence of the competent authority. The leave that could have been granted under Rule 14 of the PTC Rules is only leave under special circumstances. In the context in which that Rule is

placed and the service to which that Rule relates, it has to be understood that it is not akin to and cannot be interpreted and extended to the type of leave available in terms of Appendix XII A to Part I KSR. This means that with the aid of leave granted under Rule 14 of the PTC Rules, one cannot proceed abroad and serve any other employer. Leave for the purpose of any such employment cannot be granted under the cover of Rule 14 of the PTC Rules.

5. Having regard to what is stated above, in the context of his service in the State Government, it was unlawful if the petitioner have secured or proceeded for employment abroad while being a member of the Part-Time Contingent Service of the State.

6. The respondents rejected the application of the petitioner for five years' leave. That order is dated 9.2.1996. It has to be immediately noticed that the period of leave granted as per Ext.P1 order dated 18.12.1995 was only for a period of 120 days. Therefore, the application for leave for five years stood

rejected during the currency of the leave granted as per Ext.P1. Even if the petitioner feigns ignorance of the decision of the Government on 9.2.1996 refusing to grant leave for five years, in the absence of any such leave having been expressly granted, it was the bounden duty of the petitioner to have rejoined duty on the expiry of the leave granted as per Ext.P1 order because leave can be availed only if granted.

7. Taking the stand that he was not aware of the order of the Government rejecting the application for five years' leave, and that he came to know of such decision only through some of his family members, the petitioner made Ext.P2 representation dated 24.10.1997, i.e., more than 1 ½ years or even more of the rejection of the application for leave, to rejoin duty. He pleads to have noticed thereafter that by order dated 9.9.1996, his service was terminated. He, on 10.11.1997, made Ext.P3 representation requesting permission to rejoin duty. Thereafter he filed a writ petition as O.P.No.20459/97 seeking a declaration that he is entitled to rejoin duty and for a direction to the respondents to

regularise the period during which he was absent from service, without leave, as leave without allowance on the basis of Appendix XII A of Part I KSR and for a direction to let him rejoin duty. That writ petition was disposed of by this Court on 19.11.1997 as per Ext.P4 judgment granting the only relief of a direction to consider and pass orders on a representation which was then pending. The other reliefs sought for were not left open. The petitioner was not given the liberty to adjudicate afresh any of his other grievances.

8. Thereafter, by the impugned Ext.P5, the Government concluded that his request to rejoin duty cannot be considered. This writ petition is filed challenging that decision.

9. In opposition to this writ petition, a counter affidavit was presented on 6.1.1999 on behalf of the second respondent, sworn to on 30.11.1998, stating specifically, among other things, in para (3) thereof, that on 9.9.1996, the petitioner's service was terminated with effect from 12.3.1996, the date from which he

was on unauthorised absence. It is also specifically pleaded that show cause notice and the termination order were forwarded to the petitioner by registered post with acknowledgement due, which were returned by the postal authorities, unaccepted.

10. Long thereafter, on 6.12.2005, I.A.No.18086/05 was filed by the petitioner seeking leave to amend the writ petition to challenge the order of termination of his service. It is pleaded in that petition and in the averments sought to be incorporated, that the order of termination from service was not served on the petitioner and he obtained it only on being pasted on his service book. I may immediately notice, as noted above, that even the writ petition discloses that he was aware of the fact that his service was terminated. That fact is also specifically pleaded with reference to dates, in the counter affidavit on 6.1.1999, more than six years before the application for leave to amend the writ petition is presented. At this distance of time, the discretionary jurisdiction of this Court cannot be extended to the petitioner by granting leave to amend the writ petition. That

apart, having regard to the nature of the disposal of his earlier writ petition, which obviously has become final and havign regard to the fact that the petitioner does not seem to be aggrieved at all by that, he is concluded by the principles of res judicata and all questions regarding the illegality, irregularity and impropriety of his termination from service stand concluded against him. Under such circumstances, I.A.18086/05 is dismissed.

11. Learned counsel for the petitioner urged that having regard to the quality of jurisdiction available under Article 226 of the Constitution of India, as noticed by the Division Bench of this Court in **President of India** v. **Kunjappan** (1985 KLT 238), the court has to step in and do justice when it is found that the situation in hand is the result of violation of the applicable statutory provisions. The vistas of jurisdiction under Article 226, the quality, content and scope of Article 311 of the Constitution and other attendant factors do not persuade me to incline even a bit, in favour of the petitioner, particularly when the period of

absence was as a result of and in the direct consequence of his leaving the territory of India without the express approval of the State Government and for employment abroad, while his application for leave for employment abroad was still pending. His conduct of having proceeded abroad on the strength of an order of leave granted under Rule 14 of the PTC Rules does not inspire this Court on ground of equity, justice, good conscience, fair play, reasonableness or any such other relative yardstick to come to the aid of the petitioner by directing the Government to reinstate or re-employ him.

12. Learned counsel for the petitioner referred to the decision of the Apex Court in **Syed Zaheer Hussain** v. **Union of India and Others** (AIR 1999 SC 3367) and urged that in a similar case of termination of service on ground of long absence from service, the Apex Court had considered the principle of proportionality of punishment and extended relief by ordering reimbursement with 50% back wages. The facts of that case appear to be glaring. The total period during which the delinquent in that case had

absented himself from service was seven days. The Tribunal had also come to the conclusion that the punishment of removal from service meted out by the Government in that case was disproportionately exorbitant. However, the Tribunal felt it to be not within its jurisdiction to grant any relief. It was under such exceptional circumstance and facts peculiar to that case that the Apex Court granted such relief in that case. I am not persuaded to apply that decision as a precedent for the case in hand because it would be diabolic an equation, if I were to ignore the distinction between the facts of that case and those of the case in hand, wherein the petitioner had obviously absented for a fairly long time and he wanted to rejoin duty only after 1 ½ years after his granted period of leave had expired.

13. In the aforesaid circumstances, I do not find any illegality in the decision of the Government. I also do not find any legitimate right in the petitioner for the reliefs sought for.

In the result, the writ petition fails. It is dismissed accordingly. No costs.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

kkb.

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THOTTATHIL B. RADHAKRISHNAN, J

O.P.NO.7033 OF 1988

JUDGMENT

23rd MAY, 2007.

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